HONG LEONG BANK BHD

v.

PHUNG TZE THIAM

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
TENGKU BAHARUDIN SHAH JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: S-04-279-2006]
26 MAY 2008

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Failure to comply with order of Court of Appeal for refund of monies - Correct forum for execution or enforcement of judgment - Whether High Court or Court of Appeal*

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Failure to comply with order of Court of Appeal for refund of monies - Whether order could be enforced by means of committal proceedings - Substance of order - Whether a money judgment or judgment requiring performance of an act*

This was a motion for leave by the appellant bank to commit the respondent for contempt of court arising from the latter's failure or refusal to comply with an order of this court. The respondent, who had brought proceedings against the appellant for dismissing him without just cause or excuse, had successfully moved the appellant to pay him the backwages he was entitled to receive (amounting to RM618,322.97) pursuant to an order of reinstatement granted by the High Court. Later, on 25 April 2007, this court allowed the appellant's appeal against the order of reinstatement and ordered the respondent to refund the sum paid to him, less the sum of RM130,000 paid to the Employees Provident Fund, within 30 days of this court's order. The respondent's non-compliance resulted in this application.

Held (dismissing the application)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) When an appeal is allowed, any judgment this court enters is enforceable not in this court but before the High Court. This is because an appeal to this court is merely a continuation of

A the trial, and all that this court does is to review the case and enter such judgment as ought to have been entered by the High Court. So, when an appeal is allowed and a consequential order is made, for example, for the payment or refund of monies, that judgment must be executed or enforced
B in the High Court. So, if committal were to lie at all, the application to attach must be made to the High Court whose order this court reversed. (para 3)

(2) The order of 25 April 2007 in essence required the
C respondent to repay a part of the sum that had been paid to him by the appellant. In point of form, it may appear to be an order requiring the respondent to do an act, namely to refund the money. A court, however, is concerned with substance and not form, and the substance of the order under
D consideration here was that it was a money judgment and not a judgment requiring the performance of an act. Therefore, the order of this court dated 25 April 2007 could not be enforced by means of committal proceedings. But that was not to say that the appellant was without remedy. It may enforce the
E said order in the usual way in which money judgments are enforced. (para 5)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah usul perayu untuk kebenaran mengkomitkan responden
F kerana menghina mahkamah yang berbangkit dari kegagalan responden untuk mematuhi satu perintah yang dibuat oleh mahkamah ini. Responden, yang telah memulakan prosiding terhadap perayu kerana membuang kerjanya tanpa sebab dan alasan yang munasabah, berjaya menuntut perayu supaya
G membayar gaji tertunggak yang terhak kepadanya (berjumlah RM618,322.97) di bawah satu perintah pengambilan semula yang dibuat oleh mahkamah ini. Kemudian dari itu, pada 25 April 2007, mahkamah ini telah membenarkan rayuan perayu terhadap perintah pengambilan semula dan memerintahkan supaya responden
H membayar balik jumlah yang dibayar kepadanya, kurang RM130,000 yang dibayar kepada Kumpulan Wang Simpanan Pekerja, dalam tempoh 30 hari dari tarikh perintah. Responden gagal mematuhi perintah ini sekaligus menyebabkan permohonan di sini.

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Diputuskan (menolak permohonan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Apabila satu rayuan dibenarkan, apa jua keputusan yang dibuat oleh mahkamah ini boleh dilaksanakan bukan di mahkamah ini tetapi di Mahkamah Tinggi. Ini kerana rayuan ke mahkamah ini hanyalah kesinambungan kepada perbicaraan, dan apa yang dilakukan oleh mahkamah ini hanyalah mengkaji semula kes dan mencapai keputusan yang sepatutnya dicapai oleh Mahkamah Tinggi. Oleh itu, apabila satu rayuan dibenarkan dan perintah konsekuental dibuat, contohnya untuk pembayaran atau pengembalian semula wang, penghakiman tersebut mestilah dikuatkuasakan oleh Mahkamah Tinggi. Oleh itu, sekiranya pun perintah komital boleh dilaksanakan, permohonan baginya hendaklah dibuat kepada Mahkamah Tinggi yang membuat perintah yang telah diakas oleh mahkamah ini.

(2) Perintah bertarikh 25 April 2007 secara intinya mengkehendaki responden mengembalikan jumlah yang telah dibayar kepadanya oleh perayu. Dari segi bentuknya, ia kelihatan seperti perintah yang mengkehendaki responden melakukan sesuatu, iaitu mengembalikan wang. Sebuah mahkamah, bagaimanapun, perihatin kepada isi dan bukannya bentuk, dan isi perintah di sini adalah bahwa ia adalah satu penghakiman wang dan bukannya penghakiman yang mengkehendaki perlakuan sesuatu perbuatan. Oleh itu, perintah mahkamah ini bertarikh 25 April 2007 tidak boleh dikuatkuasakan melalui prosiding komital. Bagaimanapan ini tidak bererti bahawa perayu ketandusan apa-apa remedi. Ia boleh menguatkuasakan perintah tersebut dengan cara biasa di mana penghakiman wang dikuatkuasakan.

Case(s) referred to:
Iberian Trust, Ltd v. Founders Trust and Investment Co, Ltd [1932] 2 KB 87 ***(refd)***
Re Oddy, Major v. Harness [1906] 1 Ch 93 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 45 r. 5

For the appellant - N Sivabalah (Norbert Yap with him); M/s Jayasuria Kah & Co
For the respondent - Govinda Raj; M/s Raj & Co

[Appeal from High Court, Kota Kinabalu; Judicial Review No: K25-15-2005]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This is a motion for leave by the appellant to commit the respondent for contempt of this court said to arise from the latter's failure or refusal to comply with an order of this court. We dismissed the motion and now give our reasons.

[2] The relevant facts are simple enough. The appellant bank was the respondent's employer. It dismissed him. The respondent made complaint that his dismissal was without just cause or excuse. His case was referred to the Industrial Court which found for the respondent but awarded compensation in lieu of reinstatement. The appellant applied for judicial review of the award. It wanted the award quashed. The respondent also applied to have the award reviewed on the ground that he ought to have been reinstated. The High Court dismissed the appellant's application, granted the relief sought by the respondent and directed reinstatement. The appellant appealed to this court. In the meantime the respondent wrote asking for all back wages that he claimed he was entitled to receive pursuant to the order of reinstatement. The appellant disputed this claim. The respondent then successfully moved the High Court to obtain the back wages claimed by him. This came to RM618,322.97. The respondent threatened enforcement and the appellant paid this sum. Later, on 25 April 2007, this court allowed the appellant's appeal and ordered the respondent to refund the sum paid to him less the sum of RM130,000 paid to Employees Provident Fund. The refund was to be made within 30 days of this court's order. The respondent has not complied. Hence the application.

[3] The first point we make has to do with the choice of forum. When an appeal is allowed, any judgment this court enters is enforceable not in this court but before the High Court. This is because an appeal to this court is merely a continuation of the trial and all that this court does is to review the case and enter such judgment as ought to have been entered by the High Court. So, when an appeal is allowed and a consequential order is made, for example, for the payment or refund of monies, you have to execute or enforce that judgment in the High Court: not in this court. So, if committal were to lie at all, the application to attach must be made to the High Court whose order this court reversed.

[4] The second point we make has to do with the choice of the enforcement remedy. Can the appellant enforce the order of this court directing the refund by way of committal proceedings? In answering this question, we must bear in mind that it is only an order that requires a party to do or refrain from doing an act that may be enforced by committal for contempt. That much is clear from the terms of RHC O. 45 r. 5 which provides as follows:

> (1) Where:
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> (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or
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> (b) a person disobeys a judgment or order requiring him to abstain from doing an act,
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> then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say -
>
> (i) with the leave of the Court, an order of committal;
>
> (ii) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;
>
> (iii) subject to the provisions of the Debtors Act, 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

A **[5]** Now, in *Re Oddy, Major v. Harness* [1906] 1 Ch 93 it was held by the English Court of Appeal that "an order to recover money is not an order on the defendants to do anything, and therefore that such order could not be enforced either by a supplementary order for the payment of the money within a fixed
B time or by attachment", per Luxmoore J in *Iberian Trust, Ltd v. Founders Trust and Investment Co, Ltd* [1932] 2 KB 87. The order of 25 April 2007 in essence required the respondent to re-pay a part of the sum that had been paid to him by the appellant. In point of form, it may appear to be an order requiring the
C respondent to do an act, namely to refund the money. But a court is concerned with substance and not form. And the substance of the order under consideration here is that it is a money judgment and not a judgment requiring the performance of an act. We must therefore answer the question we posed in para
D 4 of this judgment in the negative. That is to say, the order of this court dated 25 April 2007 cannot be enforced by means of committal proceedings. But that is not to say that the appellant bank is not without remedy. It may enforce the said order in the usual way in which money judgments are enforced.

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[6] The application was accordingly dismissed.

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